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VEERAYAH SUBRAMANIAM

v.

PADAMAKAVANDER SUBRAMANIAM

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HIGH COURT MALAYA, ALOR SETAR

SEE MEE CHUN JC

[CIVIL SUIT NO: 22-141-2008]

21 NOVEMBER 2010

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SUCCESSION: *Will - Validity - Whether deceased had testamentary capacity - Whether deceased's medical condition affected her testamentary capacity - Whether deceased able to affix her thumbprint on the will - Suspicious circumstances surrounding the will - Whether plaintiff knew of contents of will before it was opened - Whether plaintiff knew the existence of an earlier will - Whether plaintiff had intention to manipulate and influence the deceased*

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EVIDENCE: *Expert evidence - Qualifications of expert - Evidence of doctor as to deceased's medical condition - Whether evidence of the doctor's qualification necessary*

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Both plaintiff and defendant were the children of the late Kaliamah Sellan ('deceased'). The plaintiff sought a declaration that the deceased's will dated 21 September 2005 ('2005 will') was valid. The 2005 will was drawn up by the deceased's solicitor ('PW2'). The defendant was not included in the 2005 will and he disputed the 2005 will. The defendant sought to admit the deceased's earlier will dated 21 July 1998 ('1998 will'). The issues to be determined were (i) whether the deceased had testamentary capacity to make the 2005 will and; (ii) whether there were suspicious circumstances surrounding the making of the 2005 will.

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Held (allowing the plaintiff's claim):

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(1) The plaintiff adduced evidence of the deceased's doctor ('PW3') who gave evidence of the deceased's health conditions. The defendant's expert witness had never examined the deceased and his evidence was based on what would happen if the deceased was untreated. The evidence of PW3 was based on direct contact and examination of the deceased. His evidence was given preference as to the deceased's health condition. There was no need for evidence

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of PW3's qualification as he was not called as an expert witness but as someone who could give evidence on the deceased's medical and mental condition. (paras 16 and 17) A

- (2) Both PW2 and PW3 were disinterested parties. PW3's evidence of the deceased's health that she was normal and able to answer questions rationally, and PW2's evidence that she understood the contents of the will when it was read to her in Tamil, pointed towards her testamentary capacity. (para 25) B

- (3) The defendant alleged that the deceased could not have affixed her thumbprint on the will as she had stroke that rendered her right hand bent at the elbow and the fingers stiffened. He produced a photo of the deceased as evidence. The photos however did not indicate such a condition and this was supported by PW2's evidence that she looked normal when making the 2005 will. (para 38) C D

- (4) The plaintiff claimed that he knew of the 1998 will after the deceased's death. The defendant and his brother, Manikam, alleged that the plaintiff knew of the will in a meeting to discuss their late father's estate. Based on the evidence, it was essentially the word of the plaintiff against the defendant. Since the defendant and Manikam were against the plaintiff, they would give evidence in unison. After considering the evidence carefully, it was clear that there was a meeting to discuss their father's estate but it was unlikely that there was a meeting on the 1998 will. (paras 39-41) E F

- (5) The defendant alleged that the plaintiff's conduct indicated that he knew of the contents of the 2005 will before it was opened. Both the parties claimed a different date as to when the will was opened. Since none of the parties had attempted to challenge the varying dates, the earlier date was more probable as there was the existence of another will. This meant that the plaintiff only knew of the contents of the 2005 will when it was opened. (paras 42-44) G H

- (6) The plaintiff was able to dispel the suspicious circumstances described by the defendant, and although the plaintiff benefited more from the 2005 will, it had not been substantially more. (para 46) I

- A (7) The defendant alleged that the plaintiff had a grudge on him. However, the court was of the view that it was not to the extent that the plaintiff would want to manipulate and influence the deceased to come up with the 2005 will. (para 48)
- B **Case(s) referred to:**
Banks v. Goodfellow [1870] LR 5 QB 549 (*refd*)
Dr Shanmuganathan v. Periasamy Sithambaran Pillai [1997] 2 CLJ 153 FC (*refd*)
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC (*refd*)
- C *Tyrell v. Painton & Anor* [1894] P 151 (*refd*)

For the plaintiff - Tan Beng Hong (Mohamad Zulkifli Osman with him); M/s Jin-Nge & Co
For the defendant - Raj Shankar; M/s Raj Shankar
- D *Reported by Melinda Robert*

JUDGMENT

E **See Mee Chun JC:**

- [1] Plaintiff is the younger brother of defendant and both are the sons of Kaliamah a/p Sellan (Kaliamah) and Subramaniam s/o Padaman (Subramaniam). Defendant is the eldest son while
- F plaintiff is the third son. Subramaniam passed away on 1 July 2002 and Kaliamah on 30 December 2005. Plaintiff seeks a declaration that Kaliamah's will dated 21 September 2005 (2005 will-P5) is valid. Defendant disputes 2005 will and seeks instead to admit Kaliamah's will dated 21 July 1998 (1998 will-D32). In
- G 1998 will defendant was a beneficiary along with plaintiff and their other brothers Rajagam, Manikam and Ramanathan. Defendant has been excluded from 2005 will while plaintiff and the other brothers and the children of a deceased brother Thiagarajan (Somu, Ragu, Shanker and Nirmala) were made beneficiaries.

H **The Law**

- [2] When the validity of a will is challenged the burden lies on the person propounding the will. In the Federal Court case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 it was
- I stated at p. 322:

... where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will.

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Hence plaintiff bears burden of proving testamentary capacity and that of dispelling suspicious circumstances surrounding the making of the 2005 will.

Testamentary Capacity

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[3] In *Gan Yook Chin (supra)* the Federal Court said at p. 321 that “It is trite law that for a will to be valid, a testator must have testamentary capacity. Whether a testator has testamentary capacity depends on the facts of each case”. The court approved what is meant by testamentary capacity as laid down in *Banks v. Goodfellow* [1870] LR 5 QB 549, specifically the sentiments expressed by Cockburn CJ who said *inter alia* as referred to at p. 321:

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It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties ... In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of;

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[4] Kaliamah was 81 years when the 2005 will was drawn up on 21 September 2005. It is common ground she had diabetics and had previously suffered a stroke. Plaintiff who gave evidence as plaintiff witness 1 (PW1) denied she had high blood pressure. PW1 maintained that she could walk with the aid of a walking stick. Defendant who gave evidence as defendant witness 1 (DW1) says Kaliamah had hypertension since 1983, diabetic mellitus since 1987 and stroke with right hemiparesis since 1993. She had CT Scan Head done on 4 August 1993 which showed Left Internal Capsule Infarct. She was 69 years then.

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A *Evidence Of Doctor*

[5] Kaliamah had been attended to by plaintiff witness 3 (PW3 Dr N Sathiam Reddy). PW3 has been seeing her once a month since her first visit on 30 March 2004 with her last visit being 18 December 2005. PW1 brings her to the clinic. On her first visit he checked for hypertension and found none; in fact her reading was 130/80. At each visit which takes about ten minutes PW3 would do a general check up, check her blood and give her medicine. He had never prescribed any medication for hypertension and neither was he treating her for stroke. PW3 described her as rational, able to talk and answer his questions. The questions were on her medical condition. He had no cause to question her mental and emotional state.

D **[6]** The following were posed to him:

Q: Stroke with right hemiparesis, what do you understand?

A: Clot in the brain which is pressing the internal capsule of the brain, thalamus.

E Q: What does it mean by right hemiparesis?

A: Weakness of the right side of the face and limbs.

Q: A CT scan showing left internal capsule infarct, would it mean that clot on left internal capsule?

F A: Yes.

Q: And this would result in right hemiparesis?

A: Yes.

G Q: If patient had left internal capsule infarct which resulted in right hemiparesis she would have weakness of right side of face and limbs.

A: Yes.

H **[7]** He initially agreed she had weakness and was unable to use right side of hand and had limited movement on right side of leg but later said he was unsure whether the weakness was on the right or left limbs. Each time she came she had her walking stick.**I** **[8]** PW3 prepared a report on deceased dated 12 January 2006 (P24) that the deceased “is a known case of diabetic mellitus” and “her diabetics was well control and her conscious state was

normal". His basis for so saying was her ability to answer questions rationally and normally. The report was prepared on PW1's request and he agreed that next of kin do not ask for medical report of deceased patient. A

[9] In cross examination it was put to him "if a patient with stroke and left untreated would they suffer from emotional and mental trauma". He answered "at time of stroke naturally. Under treatment for sometime they may come out of it, when they start walking". It was further put to him: B

P: Agree person who suffers from stroke treated and left untreated for 1-1 1/2 years will relapse into emotional and mental trauma; anxiety. C

A: I will not know.

P: You will not know because you are not qualified to comment. D

A: Not to my knowledge as anything can happen.

P: Is there a possibility?

A: It can happen. E

[10] In re examination he said trauma and anxiety are normally at time of stroke. Deceased had not displayed any sign of it during her visits to the clinic. F

[11] From PW3's evidence I find that Kaliamah was unable to use right side of the hand, walked using walking stick, was normal and rational and able to answer questions put to her.

[12] To refute PW3's evidence defendant called an expert witness defendant witness 6 (DW6 - Dato L Ramachandran). DW6 has 30 over years experience of treating patients with diabetics and hypertension. According to him the effects of untreated hypertension on an 81 year old female with diabetics could lead to stroke, heart attack and kidney failure. The following were asked of him: G H

Q: If had suffered stroke with right paralysis at 69, condition at 81 if not treated properly for diabetics and not all for high blood pressure. I

A: High risk of stroke or recurrent minor stroke with heart disease and kidney failure.

- A Q: Would minor stroke be obvious to lay man?
A: No unless can access mental status as can do daily activities but not mental activities such as directions.
- B Q: Memory and decision making ability impaired?
A: High possibility.
Q: Effect physically of right paralysis?
A: Right lower limb swollen outwards not in neutral position.
- C [13] According to DW6 the person would have difficulty in walking. When shown D33(a) which is a photo of Kaliamah DW6 said her right lower limb is swollen outwards. He however agreed a photo cannot be substituted for physical examination.
- D [14] On P24 which is the medical report prepared by PW3 DW6 said the statement “her diabetes was well control” has no meaning. Such a statement is only possible with information on among others morning fasting blood glucose, post meal blood cholesterol, LDL and HDL and blood pressure reading.
- E [15] In re examination DW6 confirmed he had not examined Kaliamah and would have been in better position to give an enlightened opinion had he done so. His evidence was not based on assumption but is on what would happen if the patient was untreated.
- F [16] As between the evidence of PW3 and DW6 I would prefer the evidence of PW3 as the doctor who had attended to Kaliamah once every month since 30 March 2004 until the date of her last visit on 18 December 2005 just prior to her death as opposed to
- G DW6 who has never examined her. DW6’s evidence is premised on information given as in “what if untreated”. PW3 evidence is based on direct contact and examination of the patient and her answers to his questions on her health.
- H [17] Defendant counsel submitted there was no evidence of PW3 qualification and hence it could not be assumed he’s a doctor. It is my view the need for evidence of qualification arises for expert witnesses such as DW6. Here PW3 was not called as an expert witness but as one who could give evidence on the deceased
- I medical and mental condition. If that were the case the evidence of the lawyer who prepared the 2005 will should also be challenged as there was similarly no evidence of his qualification.

[18] I find DW6's dismissal of the statement in P24 that "her diabetics was well control" as without meaning unless certain information was forthcoming to be almost blasé. This is because PW3 as the attending doctor would know his patient's condition better and he had not been cross examined as to how he had arrived at that conclusion.

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[19] As to PW1 having requested the preparation of P24 there is nothing unduly suspicious about it although next of kin do not normally request for one.

Evidence Of Lawyer

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[20] The 2005 will was drawn up for Kaliamah by plaintiff witness 2 (PW2 - Mr Balabedha a/l Ramaloo) and witnessed by PW2 and his late wife, also a lawyer. In his witness statement (P25) he says the 2005 will was executed on 21 September 2005 at his office. He took about 30 minutes to explain the contents to her in Tamil and she appeared normal (nampak seperti biasa) and in good health (keadaan sihat). He suggested she thumbprint to which she agreed. She thumbprinted the 2005 will in his presence and that of his late wife without any assistance. He had so suggested as it was more effective (lebih berkesan). He identified P5 as the 2005 will that he prepared and confirmed Kaliamah's thumbprint.

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[21] Prior to the execution of the 2005 will Kaliamah had been to his office on 15 September 2005 to instruct him to prepare the will. She informed him of a previous will and she now wanted to provide for her grandchildren.

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[22] In cross examination PW2 said on 15 September 2005 Kaliamah had come with PW1. She had brought along photocopies of identity cards of beneficiaries and some written names with identity card numbers. Names were written in Rumi alphabets. She also brought along particulars of the property as described in the will. She instructed him to prepare the will in the name of the beneficiaries given. Other than particulars of beneficiaries, property and how they were to be divided PW2 didn't ask her anything. On the thumbprint this was her right thumbprint although it is not stated so. She stood up to make the thumbprint. After the 2005 will was executed he put it in an envelope, sealed it and gave it to her.

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A [23] Both times she was alone with PW2. His office is two storeys and he is on the 2nd floor. She walked up with plaintiff who then went down. On the day of execution of will she went down by herself.

B [24] In so far as her testamentary capacity is concerned PW2 evidence is that Kaliamah appeared normal and in good health and could affix her own thumbprint. There is no reason not to believe PW2 as he is a disinterested party.

C *Evidence Of PW2 And PW3 Taken Together*

D [25] The evidence of PW3 as to Kaliamah's health in that she had no high blood pressure and her diabetics was well controlled and that she was normal and able to answer questions rationally point towards testamentary capacity. The evidence of PW2 that he explained the contents in Tamil and that she understood similarly point towards testamentary capacity. Both PW2 and PW3 are disinterested parties.

Other Evidence

E [26] Even if the list of beneficiaries had not been prepared by Kaliamah PW2 had explained the contents of the will to her in Tamil and would include the beneficiaries. Being of sound mind and rational she would understand the contents and realize if her intended beneficiaries had not been included.

F [27] The fact of Kaliamah staying with plaintiff from 19-6-2003 till her death and depending on him for her daily and medical needs is not sufficient inference that she was totally under his control and influence. The other sons could visit which they did although defendant says he was never allowed to be alone with her. Plaintiff says if they had wanted to be alone defendant should have said so as otherwise defendant would feel offended at being left alone.

G [28] Defendant referred to an earlier will made by Kalimah in 2003 (ID10) where the sole beneficiary was Ramanathan the son she was then staying with to prove that she would sign any document without knowing the contents. Here no evidence was led on that will such as how it was made and as such I will disregard that part of the evidence.

H [29] Kaliamah had also signed a statutory declaration (SD) dated 4 August 2004 (P4) that the grant to house no 704 had been "tercicir". Defendant said this was further proof of her signing

documents without understanding the contents as the SD was not translated in Tamil. According to PW1 the SD was prepared by the land officer who explained the contents and he translated. This explanation is possible as otherwise the person who witnessed the SD would not have signed it.

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[30] One can also refer to the statutory declaration signed by Kaliamah as late as 21 February 2005 (D16) to distribute some fixed deposits among her sons as evidence of her sound mental faculty. Although there was a jurat this does not detract from the fact that she had the capacity to understand documents.

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[31] In regard to Kaliamah having some medical history in the form of stroke and diabetics as per *Gan Yook Chin (supra)* “it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of”.

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Finding On Testamentary Capacity

[32] For all the above reasons Kaliamah had testamentary capacity to execute 2005 will.

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Circumstances Surrounding The 2005 Will

[33] In the Federal Court case of *Dr Shanmuganathan v. Periasamy Sithambaran Pillai* [1997] 2 CLJ 153 the court quoted the case of *Tyrell v. Painton & Anor* [1894] P 151 at pp. 167 & 168:

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... that if a party writes or prepares a will under which he takes a benefit, that is circumstances that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

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The Supreme Court of India in *Indu Bala v. Maindra Chandra Bose* AIR 1982 SC 133 describe the nature of circumstance that would excite the court's suspicion as:

A circumstance that would be ‘suspicious’ when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

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- A [34] Defendant counsel had prepared an extensive submission on the suspicious circumstances surrounding the 2005 will which he says ought to excite the court's suspicion. These relate to the SD, list of beneficiaries given to PW2 and execution of the 2005 will.
- B [35] On the circumstances leading to the SD plaintiff said Kaliamah told him she didn't have the house grant and she didn't know where it was. Although she said it might be in the cupboard at the old house and he knew that defendant had taken all documents he didn't ask defendant. Instead he went to land office
- C and there the SD was prepared for Kaliamah to thumbprint. The SD says she looked for the grant for purpose of renewal and that it was "tercicir". It is possible that the SD was prepared as per plaintiff's instructions but this does not mean that Kaliamah had the title with her. Whether it was misplaced or she didn't know
- D where it was the fact of the matter is that it was not with her. Further for the reasons stated earlier she understood the contents.
- E [36] On the list of beneficiaries I have already stated that assuming plaintiff had a hand in it this would be negated by PW2 having explained the contents to her.
- [37] On the events at PW2 office defendant has submitted it would not be possible for Kaliamah to walk up 1 floor to PW2 office when PW3 said she came to his clinic with a walking stick.
- F It was also not possible for her to have stood up to right thumbprint the 2005 will as her stroke had left her right hand bent at the elbow and her fingers of her right hand stiffened. This condition is as described by defendant and Manikam. I accept there's a discrepancy on evidence as to whether Kaliamah could
- G walk up 1 floor when she had to use a walking stick to the clinic. This however does not go to the core of the evidence.
- [38] The more serious allegation is that she could not have right thumbprinted the 2005 will. Although PW3 said she had weakness of her right hand he did not say her right hand was bent at the
- H elbow nor the fingers of her right hand stiffened. The photo (D33) which defendant says clearly shows the condition of her right hand does not indicate so. Hence it would be possible for her to have thumbprinted the 2005 will as described by PW2. On PW2
- I evidence that she looked normal that is acceptable as evident from the photo in D33. Defendant has made a sweeping statement not

supported by the evidence when he submitted at p. 8 “Did he actually meet up with Kaliamah? Was the person who allegedly executed the said 2005 will the real Kaliamah? Balabedha never identified who was the Kaliamah who executed the will”. I do not doubt that Kaliamah had executed the 2005 will.

Whether Plaintiff Knew Of 1998 Will

[39] Plaintiff says he first knew of 1998 will after Kaliamah’s death. Defendant witness 2 (DW2 - Manikam a/l Subramaniam, 4th son) in his witness statement (D34) at Q&A 22 says otherwise. He says when Mr Balakrisnan (their father’s lawyer) read Subramaniam’s will in 2002 he told all beneficiaries that Kaliamah had made a will at the same time as Subramaniam’s will. I do not believe Manikam as a lawyer would not divulge such a fact.

[40] Affidavits of defendant dated 26 February 2007 (D18), statutory declarations of Manikam dated 7 February 2007 (ID 19), Rajagam’s dated 13 February 2007 (P20) and Ramanathan’s dated 7 February 2007 vouching for the authenticity of the 1998 will and not the 2005 will does not show they knew of the 1998 will much earlier as the affidavit and statutory declarations were only made in 2007.

[41] As to the meeting of the brothers in May 2003 where it was agreed that the 1998 will should prevail instead of the February 2003 will where Ramanathan was the sole beneficiary as stated by defendant and Manikam and the outcome reduced into writing by defendant (D29), counsel submits this shows plaintiff knew of 1998 will earlier. Plaintiff had earlier stated although he knew of February 2003 will there was no such meeting. D29 is only defendant’s own notes and was not confirmed by plaintiff hence it does not support there was such a meeting. It is essentially the word of defendant and Manikam against plaintiff. As all the brothers were against plaintiff in 2005 will it is not surprising that both will give evidence in unison, and as such I need to consider their evidence most carefully and not merely accept on the basis of numerical superiority. It may well have been there was no such meeting on the February 2003 and 1998 will although there was a meeting to discuss on their father’s estate.

A Whether Plaintiff Knew Contents Of 2005 Will

[42] Plaintiff says he knew the contents of 2005 will on 13 January 2006 when it was opened in his house. He says he gave the envelope to defendant who opened it. He had informed the brothers of the 2005 will on the 8th day prayers for Kaliamah which would be 8 January 2006. It was agreed that all would come to his house.

[43] Defendant and Manikam say the envelope was already opened when it was given to defendant. According to them the 2005 will was opened on 20 January 2006. Counsel also says that the fact of Kaliamah's jewellery being sold on 18 January 2006 and distributed among the brothers except defendant shows that plaintiff knew the contents prior to its opening. The fact of him asking for a medical report on 12 January 2006 when it's not normal to do so also shows plaintiff already knew the contents.

[44] As to the date when 2005 will was opened there was no attempt by either counsel to challenge the varying dates given, 13 January 2006 or 20 January 2006. It is more probable that an early date for the reading of the will is likely especially when there was another will thereby making 13 January 2006 more probable. This would be consistent with plaintiff's evidence that when he disposed of the jewellery he knew the contents of 2005 will as it had already been read.

[45] On whether the envelope containing 2005 will was already opened when plaintiff handed over to defendant its again defendant and Manikam against plaintiff. If indeed plaintiff had drawn up 2005 will it would be better for him not to open the envelope to avoid further suspicion. If he had not done the will he would not open the envelope either.

Finding On Suspicious Circumstances

[46] The sum total of it is that plaintiff has dispelled the circumstances described by defendant as suspicious. I would add that plaintiff is not a substantial beneficiary under 2005 will, in the sense that although he gets more it is not substantially more.

Whether Plaintiff A Credible And Worthy Witness

[47] This aspect has been considered when looking at various issues under the heading of testamentary capacity and suspicious circumstances. Plaintiff was cross examined rigorously for almost

one day and he stood up to it and emerged with his evidence credible and consistent. Two aspects of his evidence did cause some hesitation on my part; whether a meeting of the brothers on the February 2003 and 1998 will did take place in May 2003 and the SD made by Kaliamah on 4 August 2004 on the “tercicir” grant. However for reasons stated earlier I preferred plaintiff’s version.

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Whether Plaintiff Has Grudge Against Defendant

[48] The circumstances relied on to show grudge is plaintiff being repeatedly questioned by defendant in the collection of rental and the delay in distribution of fixed deposit moneys. These do not constitute sufficient grounds for plaintiff to the extent of manipulating and influencing Kaliamah to come up with 2005 will.

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Conclusion

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[49] For the above reasons Kaliamah had the testamentary capacity when she executed the 2005 will on 21 September 2005 and there are no suspicious circumstances surrounding its execution. Plaintiff’s claim is allowed and defendant’s counterclaim is dismissed. The 2005 will as per P5 is valid. Costs to plaintiff.

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